No. 79-2059

DEC 15 1980

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN ELECTRIC POWER CO., INC., ET AL.,
PETITIONERS

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

WADE H. MCCREE, JR.
Solicitor General

SANFORD M. LITVACK
Assistant Attorney General

BARRY GROSSMAN
BRUCE E. FEIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JEROME NELSON
Acting General Counsel

JOHN A. CAMERON, JR.
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-2059

AMERICAN ELECTRIC POWER CO., INC., ET AL.,
PETITIONERS

v.

CITY OF MISHAWAKA, INDIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether either the *Noerr-Pennington* doctrine or the Federal Power Act shields a utility from liability under Section 2 of the Sherman Act when its unilateral wholesale and retail rate-making actions, together with other conduct, reflect a specific intent to injure competition.

2. Whether the "state action" doctrine recognized in *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent cases protects a monopolist from liability under Section 2 of the Sherman Act for manipulating federally-regulated wholesale rates and state-regulated retail rates as part of a broader scheme to injure competition.

TABLE OF AUTHORITIES

Cases: Page

Alyeska Pipeline Service Co. v. *Wilderness Society*, 421 U.S. 240 13
Berenyi v. *Immigration Director*, 385 U.S. 630 12
Brunswick Corp. v. *Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 12
California v. *FPC*, 369 U.S. 482 8
California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 7
California Retail Liquor Dealers Ass'n v. *Midcal Aluminum, Inc.*, 445 U.S. 97 ..... 9, 11
Cantor v. *Detroit Edison Co.*, 428 U.S. 579 ..... 8, 11
City of Groton v. *Connecticut Light & Power Co.*, No. 15,609 (D. Conn. Aug. 26, 1980) 12
City of Lafayette v. *Louisiana Power & Light Co.*, 435 U.S. 389 11
City of Mishawaka v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314, cert. denied, 436 U.S. 922 ..... 5, 10
Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 7
FPC v. *Conway*, 426 U.S. 271 11
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271 12
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246 2
Otter Tail Power Co. v. *United States*, 410 U.S. 366 7
Parker v. *Brown*, 317 U.S. 341 10
United Mine Workers v. *Pennington*, 381 U.S. 657 7
United States v. *Aluminum Co. of America*, 148 F.2d 416 7
United States v. *R.C.A.*, 358 U.S. 334 8

Constitution and statutes:

United States Constitution, First Amendment 8
Federal Power Act, ch. 687, Part II, 49 Stat. 847, 16 U.S.C. 824-824h 1
16 U.S.C. 824 1
16 U.S.C. 824d(c) 1

Constitution and statues—Continued Page

16 U.S.C. 824d(d) 1
16 U.S.C. 824d(e) 2
16 U.S.C. 824e(a) 2

Sherman Act, Section 2, 15 U.S.C. 2 .....3, 4, 7, 10
Pub. L. No. 95-617, Title II, 92 Stat. 3142:

Section 207(a) 1
Section 208 1

Ind. Code Ann. (Burns 1973):

§ 8-1-2-1 2
§ 8-1-2-38 2
§ 8-1-2-42 2

Mich. Stat. Ann. (1970):

§ 22.13(6) 2
§ 22.13(6a) 2

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner American Electric Power Co. (AEP) is an investor-owned public utility holding company. Petitioners American Electric Power Service Corporation and Indiana & Michigan Electric Company (I&M) are wholly owned subsidiaries of AEP (Pet. App. 107a). I&M is a public utility within the meaning of Section 201 of the Federal Power Act, ch. 687, 49 Stat. 847, 16 U.S.C. 824. It generates, transmits, and sells electric energy to both wholesale and retail customers in a service area that encompasses parts of Indiana and Michigan (*ibid.*). I&M's wholesale rates are subject to the jurisdiction of the Federal Energy Regulatory Commission (Federal Commission) pursuant to Part II of the Federal Power Act (16 U.S.C. 824-824h). Retail rates of I&M are regulated by state authorities in Indiana and Michigan.

Public utilities like petitioner I&M must file with the Federal Commission "schedules showing all [wholesale] rates and * * * all contracts which in any manner affect or relate to such rates" (16 U.S.C. 824d(c)). During the period pertinent to this litigation, I&M was required to provide 30 days' notice to the Federal Commission and the public prior to any modification of such rates or contracts (16 U.S.C. 824d(d)).[1] The Federal Commission may suspend any change in rate schedule and delay the use of a

[1] The 30-day period was extended to 60 days in 1978 by Pub. L. No. 95-617, Title II, Sections 207(a), 208, 92 Stat. 3142.

proposed rate for up to five months, and may hold a hearing "concerning the lawfulness of such rate[s]" (16 U.S.C. 824d(e)). If a hearing is not completed prior to the expiration of the five month suspension period, the proposed new schedule takes effect, but the Commission may require the utility to maintain an accurate account of amounts received by reason of the rate increase and to refund with interest any portion subsequently found "not justified" (*ibid.*).

On its own motion or on complaint, the Commission may initiate a hearing to determine whether any previously established "rate * * * or contract" is "unjust, unreasonable, unduly discriminatory or preferential," and an affirmative finding invests the Commission with authority to establish a just and reasonable rate or contract to be thereafter observed (16 U.S.C. 824e(a)). Although the Commission may disapprove existing or suspended utility rates and prescribe future rates, it may not order reparations with respect to rates that were not suspended. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951).

Petitioner I&M must file its retail electric rates with the Public Service Commissions of Indiana and Michigan. Proposed retail rates must be approved by the respective commissions prior to being placed in effect. Ind. Code Ann. §§ 8-1-2-1, 8-1-2-38, 8-1-2-42 (Burns 1973); Mich. Stat. Ann. §§ 22.13(6), 22.13 (6a) (1970). I&M retains, however, unilateral authority to propose new rates. Ind. Code Ann. § 8-1-2-42 (Burns 1973); Mich. Stat. Ann. § 22.13(6a) (1970).

Respondents are ten municipalities that operate electric distribution systems, purchase all, or nearly all, of their electric energy at wholesale from I&M,

and retail that electricity in competition with I&M (Pet. App. 110a-117a).

2. Respondents filed an antitrust action against petitioners seeking injunctive relief and damages for an alleged attempt to monopolize and monopolization of the retail sale of electric power in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. The amended complaint alleged that I&M engaged in various types of anticompetitive conduct, including a predatory price squeeze effectuated by filing with the Federal Commission wholesale rates in June 1972 and May 1976. Those rates, which applied to respondents, exceeded I&M's retail rates for industrial customers located in or near respondent's service areas. The district court [2] and the court of appeals [3] refused either to dismiss the complaint for lack of jurisdiction or to stay proceedings pending the completion of inquiries by the Federal Commission into the lawfulness of I&M's 1972 and 1976 wholesale rates. This Court denied certiorari,[4] and, on remand, the case went to trial.

The district court found that respondents operate electric utilities within the service area of I&M, that each is wholly dependent on I&M for its bulk power, that I&M possesses a monopoly in the retail sale of electric power within its service area, and that I&M competes with respondents for the patronage of all consumers residing within respondents' corporate limits (Pet. App. 48a). I&M and respondents further

---

[2] See Pet. App. 180a-199a.

[3] See *id.* at 157a-178a.

[4] 436 U.S. 922 (1978). In a brief *amicus curiae*, the United States and the Federal Commission urged that certiorari should be denied.

compete for individual customers actually located or contemplating location in each town or elsewhere in I&M's service area (*ibid.*). The district court also found (*id.* at 57a-77a) that petitioners had engaged in a series of anticompetitive and exclusionary actions with the specific intent and effect of preserving and augmenting I&M's monopoly power over retail sales of electricity. This course of conduct included (1) charging respondents unjust and unreasonable rates for wholesale electric power (rates subsequently disapproved by the Federal Commission), in excess of I&M's comparable retail rates and without cost justification; (2) disregarding obligations under the Federal Power Act to file wholesale rates only after considering their relationship with I&M's comparable retail rates and the possible anticompetitive effects caused by the wholesale-retail rate relation; and (3) repeatedly attempting to undermine respondents' source of power and competitive viability by threatening to terminate service and to impose short term, restrictive supply contracts. Accordingly, the district court concluded that petitioners had violated Section 2 of the Sherman Act through a combination of actions motivated by a specific intent to impair respondents' ability to compete, thereby maintaining or bolstering I&M's existing monopoly (Pet. App. 71a-77a). The district court rejected petitioners' contention that the *Noerr-Pennington* doctrine precluded reliance on the anticompetitive effects of I&M's wholesale and retail rate relationships to establish an antitrust violation (Pet. App. 77a-81a).

The district court awarded damages to respondents based on the difference between the unlawful wholesale rates charged by I&M and I&M's lower comparable retail rates (Pet. App. 86a-87a). In addi-

tion, the court directed petitioners in preparing and filing wholesale rates with the Federal Commission to take into account the relationship between anticipated first year billings to respondents and the billings that would result if I&M's retail rates were charged. I&M also was enjoined from charging any wholesale rate that would produce expected billings in excess of amounts that would be collected if retail rates were charged, until the Federal Commission determined that the wholesale rate was just and reasonable (Pet. App. 91a).

By a unaminous vote, the court of appeals affirmed the district court's conclusion regarding petitioners' Sherman Act liability, but vacated and remanded on issues of relief. The court of appeals noted that its prior decision in this litigation [5] had established that I&M's anticompetitive actions were subject to the Sherman Act, and that the Federal Commission had neither exclusive nor primary jurisdiction over respondents' complaint (Pet. App. 8a). The court rejected the argument that the *Noerr-Pennington* and "state action" doctrines protected petitioners from antitrust liability resting in part on the intended anticompetitive relationship of I&M's wholesale and retail rates (*id.* at 13a-23a).

The court of appeals concluded, however, that the district court had incorrectly awarded antitrust overcharge damages based on the difference between I&M's unlawfully inflated wholesale rates and the retail rates I&M was then charging. It found no support for the district court's assumption of identity between a proper new wholesale rate and the existing

---

[5] *City of Mishawaka* v. *Indiana & Michigan Electric Co.*, 560 F.2d 1314 (7th Cir. 1977), cert. denied, 436 U.S. 922 (1978).

retail rate. Instead, it held that the Federal Commission's refund order constituted the best measure of overcharge damages,[6] and that any other damages "should be based on proof of specific injuries suffered as a result of the utility's overcharges and other monopolistic practices" (Pet. App. 26a-30a). The court of appeals further held that respondents were entitled to damages for litigating costs incurred before the Federal Commission that were necessitated by I&M's threatened curtailment of their wholesale supply of electricity (Pet. App. 31a). The district court's injunction, which circumscribed petitioners' right to charge respondents wholesale rates in excess of comparable retail rates, was vacated and remanded for additional proceedings (*id.* at 35a-37a).

DISCUSSION

The decision of the court of appeals is correct and is not in conflict with any decision of this Court or any other circuit. The decision applies settled principles of law to the facts of this particular case. Review by this Court is therefore unwarranted.

1. Petitioners' contention (Pet. 16-19) that the *Noerr-Pennington* doctrine forecloses antitrust scrutiny of their unilateral decisions respecting wholesale rates filed with the Federal Commission was correctly rejected by the lower courts. The *Noerr-Pennington* doctrine reflects a rule of statutory construction that declines to impute to Congress an in-

---

[6] While the present case was pending before the court of appeals, the Federal Commission was conducting proceedings to determine whether I&M's wholesale electricity rates for 1976-1978 were unjust or unreasonable. Following the court's decision, the Federal Commission determined that the rates were, in fact, unjust and unreasonable. See pages 9-10, *infra*.

tent to penalize bona fide attempts by private parties to influence public officials to make decisions that have the effect of restraining competition.[7] In such cases, of course, it is governmental action which is the proximate or direct cause of the competitive restraint. By contrast, the anticompetitive effect in this case occurred not as a result of governmental action, but from private rate filings that preceded any governmental action thereon. Indeed, it was the delay in governmental action that made it possible for I&M to injure respondents by its rate filings. It knew that its wholesale rate proposals would go into effect prior to a Federal Commission determination of their reasonableness, while its proposals for higher retail rates in all likelihood would not become effective until long after the new wholesale rates became effective. It was the anticipated postponement of regulatory action that enabled I&M to impose a price squeeze on respondents.[8]

---

[7] See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (collective activity designed to influence the passage or enforcement of laws); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-672 (1965) (collective activity to influence the Secretary of Labor in setting minimum wages and to influence officers of the TVA in coal purchasing decisions); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972) (collective activity to influence the decisions of administrative or judicial bodies); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 379-380 (1973) (unilateral decision of utility monopolist to sponsor litigation).

[8] A monopolist violates Section 2 of the Sherman Act by engaging in a price squeeze if its wholesale rates unduly impede its wholesale customers from competing with it in the retail market, and if the monopolist sets its wholesale rates with the intent to achieve that effect. See *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 436-438 (2d Cir. 1945).

In short, I&M's rate filings were designed to forestall, rather than cause, governmental action. Under the controlling statute, the filed rates became effective unless and until the Federal Commission suspended them, and I&M obviously hoped that its filings and supporting data would simply be accepted by the Commission without any suspension and investigation. Thus, I&M's rates filings were made with the clear understanding that the rates contained therein would often become effective immediately and have the effect of damaging I&M's competitors for retail business. To that extent, they were private actions intended to have a direct effect without the intervention of a governmental body. In this context, it is clear that whatever First Amendment interest may be implicated ultimately by I&M's tariff filings, that interest does not shelter petitioners from antitrust liability based on their own immediately effective rate setting activities (see Pet. App. 16a).

Moreover, petitioners' *Noerr-Pennington* argument is flatly inconsistent with *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 601-602 (1976), where this Court held that the mere fact that a regulatory body may approve a private tariff proposal does not make the proposing party's conduct immune from antitrust scrutiny under *Noerr-Pennington.* See also *California* v. *FPC*, 369 U.S. 482, 488-489 (1962); *United States* v. *R.C.A.*, 358 U.S. 334, 350-351 (1959) (private decisions to acquire assets remain subject to antitrust scrutiny even though the acquisition was contingent on regulatory approval). By focusing on the request for state approval, petitioners' *Noerr* argument would undercut this Court's repeated holding that state authorization of private restraints does not immunize the private conduct from the federal

antitrust laws. See, *e.g.*, *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Cantor* v. *Detriot Edison, supra.*[9]

2. Petitioners also argue (Pet. 20-25) that the court of appeals improperly intruded on the rate-making province of the Federal Commission by suggesting the possibility (Pet. App. 28a) that the district court might independently calculate antitrust damages ascribable to petitioners' unlawful wholesale-retail price squeeze. They assert that, if the district court undertakes this task, its action would conflict with the Federal Commission's authority to determine just and reasonable wholesale rates. That argument, however, is plainly not ripe for review. While the court of appeals indicated that the district court could make its own overcharge assessment for the 1976-1978 period based on the Federal Commission's decision that the 1972-1976 rates were unreasonable, it clearly advised the district court to defer to the Federal Commission's then pending inquiry into the reasonableness of I&M's 1976 wholesale rates (Pet. App. 27a-28a). Subsequent to the decision of the court of appeals, the Federal Commission determined that I&M's rates were unjust, unreasonable, and un-

---

[9] We assume that the *Noerr-Pennington* doctrine would preclude the imposition of antitrust liability based solely upon the filing of tariffs intended in good faith to elicit governmental action. But the charging of rates under tariffs, as part of a broader scheme to monopolize by imposition of a price squeeze, is not immune from antitrust scrutiny. As *Cantor* v. *Detroit Edison, supra,* makes clear, *conduct* undertaken pursuant to a tariff is not necessarily shielded from antitrust liability simply because the conduct is described in a tariff.

duly discriminatory.[10] The possibility that the district court will nevertheless endeavor to establish a just and reasonable wholesale rate for the 1976-1978 period in conflict with the Federal Commission's decision (despite the court of appeals' strong urging to the contrary) is wholly speculative and does not warrant review by this Court. Similarly speculative is any concern over possible injunctive relief. The court of appeals set aside the district court's injunctive order (Pet. App. 37a) and remanded with instructions to fashion a narrower decree that does not unduly infringe on the Federal Commission's rate making authority (*ibid.*).

3. Petitioners renew the contention (Pet. 25-26) advanced in I&M's petition to this Court in No. 77-689, cert. denied, 436 U.S. 922 (1978), that the court of appeals erred in refusing to hold that the Federal Power Act repeals by implication Section 2 of the Sherman Act, as it applies to I&M's manipulation of its wholesale and retail rates with a specific intent to injure competition.[11] For the reasons set forth on pages 8-13 of the Brief for the United States as amicus curiae in No. 77-689, petitioners' contention is without merit.

4. Petitioners also maintain (Pet. 26-27) that the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943), precludes Sherman Act liability for their intentional anticompetitive price-squeeze tactics because I&M's retail rates were approved by state authorities. The foundation of petitioners' price-squeeze

---

[10] See Respondents' Br. in Opp. 15-16 n.10.

[11] Contrary to Petitioners' assertion (Pet. 25-26), the district court found, and the court of appeals agreed, that I&M's wholesale and retail rate alignments were motivated by a specific intent to injure competition (Pet. App. 20a-21a).

liability, however, was not the level of I&M's retail rates *simpliciter;* rather, liability was predicated on the anticompetitive effects caused by the *relationship* between I&M's retail and wholesale rates, coupled with petitioners' disregard of the Federal Power Act's mandate not to engage in discriminatory pricing. See *FPC* v. *Conway*, 426 U.S. 271 (1976) (Pet. App. 18a-22a; 57a-58a). No state authority either ordered or possessed authority to order petitioners to align I&M's wholesale and retail rates in a specified way, or to ignore the competitive implication of the relationship between wholesale and retail rates. As a result, the conflict between a clearly articulated state policy and federal antitrust policy which is a prerequisite for antitrust exemption under the state action doctrine is absent. See *Cantor* v. *Detroit Edison*, *supra*, 428 U.S. at 595-598; *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410-413 (1978); *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, *supra*, 445 U.S. at 103-106.

5. A fair reading of the court of appeals' opinion refutes petitioners' attempt (Pet. 12) to characterize it as one of general applicability and importance to the electric utility industry. Neither lower court held that the filing of higher wholesale rates, while lower retail rates are likely to remain in effect, would by itself violate the Sherman Act. Rather, both courts indicated that a utility's failure to consider the competitive effects of the relationship between its wholesale and retail rates, or to justify that relationship on the basis of costs, constituted conduct which, together with other exclusionary practices, could be found to manifest a specific intent to monopolize (Pet. App. 21a, 77a). Here, the district court made find-

ings that I&M possessed monopoly power, and engaged in a course of exclusionary conduct (of which the price squeeze was part) that manifested a specific intent to monopolize. The court of appeals affirmed those factual findings. There is no need for this Court to consider anew these factual issues. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949); see also *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Other courts surely will recognize that the court of appeals' decision rests on the facts of this particular case. Indeed, the very case which petitioners cite (Pet. Supp. Br. 1-4) to this Court as indicating a potential for conflict—*City of Groton* v. *Connecticut Light & Power Co.*, No. 15,609 (D. Conn. Aug. 26, 1980)—distinguished this case as resting on its facts (Pet. Supp. Br. 20SA-21SA) and concluded that it did not present any conflict. There is no reason to presume that other courts will be less perceptive.[12]

---

[12] The district court in this case found, and the court of appeals agreed, that respondents were compelled to incur litigating costs before the Federal Commission to combat threats that petitioners would curtail their supply of wholesale power (Pet. App. 32a, 59a). Those threats were elements of a course of conduct found to have violated the Sherman Act. The costs of litigating before the Federal Commission are injuries of the type the antitrust laws were intended to prevent, since the costs were necessary to preserve respondents' competitive viability. See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). As the court of appeals explained, the litigating costs were forced upon respondents by petitioners' predatory tactics and were necessarily incurred in an attempt to save the source of their electric power: "the municipalities had no choice but to file an administrative action before the Commission to prevent the loss of their wholesale power source and to establish their right to equal treatment with the utility's retail customers whom the utility

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JEROME NELSON
Acting General Counsel

SANFORD M. LITVACK
Assistant Attorney General

JOHN A. CAMERON, JR.
Attorney
Federal Energy Regulatory Commission

BARRY GROSSMAN
BRUCE E. FEIN
Attorneys

DECEMBER 1980

---

had indicated would receive preferences" (Pet. App. 32a). The court of appeals thus properly held that these litigating costs were recoverable antitrust damages, in reliance on prior decisions establishing that litigation costs forced upon parties as an integral part of an antitrust violation are recoverable (*id.* at 31a). Nothing in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), suggests that litigating costs may not be treated as recoverable antitrust damages when the necessary nexus between the costs and an antitrust violation is proven. That case dealt solely with the question whether a prevailing party could be awarded attorneys' fees incurred in bringing the litigation in question, absent specific statutory allowance. It did not consider the allowance of attorneys' fees incurred in a different litigation forced upon the victim of a predatory scheme.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 334502 127